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No. 539

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In the Supreme Court of the United States

OCTOBER TERM, 1967

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, INDIANA HARBOR BELT RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellants,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, final order entered April

3, 1967, which dismissed a complaint seeking to set aside an order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court which appears in Appendix A, *infra*, pp. App. 1-9 is not yet reported in the Federal Supplement. The report of the Interstate Commerce Commission (Appendix B, *infra*, pp. App. 10-21) is printed at 322 I.C.C. 565 (1964).

JURISDICTION

This suit was brought under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325 to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered February 20, 1967; motion of plaintiffs for new trial was denied April 3, 1967; and notice of appeal was filed July 1, 1967. The District Court extended the time to docket the case in this Court to August 28, 1967. The jurisdiction of this Court to review this judgment by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). *B. & O. R.R.* v. *United States*, 277 U.S. 291 (1928).

STATUTE INVOLVED

The Statute involved is Section 1(6) of the Interstate Commerce Act, 49 U.S.C. §1(6), as set forth in Appendix C, *infra*, p. App. 22.

QUESTIONS PRESENTED

The case before the Commission resulted from a controversy between two switching railroads on the one hand, and some of its road haul connections on the other hand, as to which group of railroads should pay mileage allowance rental to shippers and car lines that furnish freight cars for use in interstate transportation by railroad. The Commission, in resolving that controversy between railroads in the favor of the road haul railroads, based its decision solely on Section 1(6) of the Interstate Commerce Act.

The question presented is:

> Did the Interstate Commerce Commission err in applying Section 1(6) of the Interstate Commerce Act, which regulates only relationships between railroad and shippers, in the circumstances of this case which is a controversy between railroads?

STATEMENT

In 1960, The Baltimore and Ohio Chicago Terminal Railroad Company (B&OCT) and The Indiana Harbor Belt Railroad Company (IHB), both switching railroads operating in the Chicago, Illinois Switching District, commenced negotiations with their road haul connections to have the road haul railroads assume payment of mileage allowance rental on shipper or privately owned freight cars for the miles those cars move over tracks of B&OCT or IHB in connection with road haul movements to, from, or through the Chicago Switching District.

In those negotiations the switching lines sought the same treatment from the line haul connections as those railroads accorded all switching railroads at all other terminals throughout the United States. Being unsuccessful in direct negotiations with their road haul connections, the Chicago switching railroads presented the controversy to the appropriate committee of the Association of American Railroads. On October 11, 1961, the AAR Committee on Car Service adopted a motion that:

> "* * * road haul railroads assume mileage charge on movement of private and railroad owned cars within switching districts * * * for application on a national basis."

That resolution was not ratified by the AAR General Committee because the dispute between railroads was local and unique to the Chicago Switching District.

Failing in those efforts to resolve the controversy, the switching railroads and three of their line haul connections,[1] filed tariffs under which the switching lines avoided payment of the disputed mileage allowance. Those tariff changes were opposed before the Commission by some of the line haul connections and by some shippers and car lines. In February, 1964, prior to the conclusion of the Commission proceeding,

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[1] The Baltimore and Ohio Railroad Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and The New York Central Railroad Company, which are also appellants here.

the tariff charges of the switching lines became effective and all Chicago road haul railroads also made complimentary charges. The effect of those tariff changes was (1) to excuse the two switching lines from the payment of mileage allowance rental, and (2) the assumption by the road haul connections of those payments.[2]

The Interstate Commerce Commission (acting through a panel of three Commissioners with one member dissenting) resolved this dispute between railroads by ordering the Chicago switching lines to cancel the involved tariffs because they constituted a practice in violation of Section 1(6) of the Interstate Commerce Act. The tariff provisions which became effective in February, 1964, remained in effect until March, 1967, at which time they were cancelled as a result of the invalid Commission order. That order is of continuing effect as it requires the switching lines to pay the contested mileage allowances.

The shippers, who at the Commission hearing expressed indifference as to who paid the allowance, dropped out of the case in February, 1964, and were not heard from in reply to petitions for reconsideration before the Commission or in support of the Commission order in the District Court. Ten road haul

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[2] The Elgin, Joliet & Eastern Railroad Company, a subsidiary of U.S. Steel Corp., did not assume obligation to pay mileage allowance. That carrier is of the nature of a switching line and was only involved to the extent of .003 of the mileage payments. It is *de minimus* in this case.

railroads and a car line subsidiary of one of those railroads intervened in the Court in support of the Commission order dated May 6, 1964. The District Court sustained the Commission report and order on the ground that Section 1(6) was applicable. (Appendix A)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal presents a question of broad ramification in the administration of the Interstate Commerce Act as well as an obvious misapplication of statute contrary to opinions of this Court.

The Commission in investigating the lawfulness of tariff changes which had the effect of shifting the payment of mileage allowances from switching railroads to their line haul connections held that "this practice is violative of section 1(6)." (App. B, p. 21). In bottoming its resolution of this dispute between carriers solely on Section 1(6) of the Interstate Commerce Act, the Commission misapplied the statute. In *B. & O. R.R.* v. *United States,* 277 U.S. 291, 299-300 (1928), this Court held that Section 1(6) cannot be applied in resolving disputes between railroads. See also *Northern Pac. Ry. Co.* v. *United States,* 41 F.Supp. 439, 443 (D. Minn. 1941).

The Commission's misapplication of the statute as sustained by the District Court, if permitted to stand, would endow the Commission with broad unfettered authority to regulate all relations between railroads

which it may consider to be unreasonable even though the practices have not been prohibited by the Congress. Such self-enlargement of the Commission's powers is contrary to established constitutional principles of administrative law and established principles of statutory construction of the Interstate Commerce Act. *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464 (1958).

CONCLUSION

The question presented by this appeal is substantial and is of public importance in the administration of the Interstate Commerce Act. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted

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